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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1306

ERIC L. HAGA
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

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ERIC L. HAGA
Petitioner,

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STATE OF WASHINGTON,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

The petitioner, Eric L. Haga, respectfully prays that a Writ of Certiorari be issued to review the decision of the Court of Appeals of Washington, Division I, affirming petitioner's trial court convictions. That decision became final on December 15, 1975 when the Supreme Court of Washington denied review of the decision of the Court of Appeals of the State of Washington in this cause.

I.

CITATION TO OPINION BELOW

The order of the Supreme Court of Washington is printed in Appendix A hereto and is reported at 86 Wn.2d 1007, ... P.2d ..... The decision of the Washington State

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Court of Appeals, to which this petition is directed, is printed at Appendix B hereto and is reported at 13 Wn. App. 630, 536 P.2d 648.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 USC § 1257 and Rules 19, 21, 22 of this Court.

III.

QUESTION FOR REVIEW

Must a state criminal prosecution be dismissed as a violation of petitioner's right to Due Process under the *Fourteenth Amendment* to the United States Constitution when (a) petitioner is not charged until five years after the crimes; (b) there is no prosecution justification for the delay in charging petitioner; and (c) petitioner's first trial does not take place until more than five year after the crimes charged and his retrial, from which this is taken, does not take place until more than seven years after the crimes charged; (d) in the interim defense witnesses have died, defense evidence in possession of the police has been lost, defense witnesses have moved and cannot be located and the recollection of significant events by defense witnesses is severely impaired; (e) there is no applicable statute of limitations.

IV.

CONSTITUTIONAL PROVISION INVOLVED

> . . . "[N]or shall any state deprive any person of life, liberty, or property without Due Process of Law".

U.S. Const. Amend. XIV § 1.

V.

STATEMENT OF THE CASE

A. Procedural Background

Judy Haga and Peri Lynn Haga, the wife and daughter of the petitioner, were murdered on July 6, 1966. The petitioner was the only suspect at that time. (St. 15)* The Coronor's jury determined in August of 1966 that the deaths were homicide by a person known to the Coroner's jury. (St. 15) More than five years later on August 30, 1971, the State of Washington filed an information against petitioner charging him with the first degree murder of his wife and daughter. (Tr. 28) The case was tried to a jury beginning on December 13, 1971. The jury returned a verdict of guilty on both charges. That conviction was reversed because of trial error not relevant to this appeal. *State v. Haga,* 8 Wn.App. 481, 407 P.2d 159 (1973). However, this state appellate court decision is printed in Appendix C hereto to show that the due process issue has been consistently raised and because the analysis in the first opinion of the prejudice suffered by petitioner from the delayed prosecution is adopted by the second appellate decision with which this petition is concerned.

Petitioner's second trial, with which this petition is concerned, began on November 26, 1973. The jury returned a verdict of guilty on both charges. (Tr. 10)

Petitioner moved for dismissal of the charges against him on the grounds of unconstitutional delay in his trial

* For this Court's convenience in referring to the record and briefs, the designations required by Washington State Rules of Appeal will be used in this petition. "Statement of Facts" (abbreviated St.) will refer to the verbatim report of the trial court proceedings and "Transcript" (abbreviated Tr.) will refer to the documents filed in the trial court.

at the beginning of his second trial (St. 228; Tr. 9, 12, 20), at the end of the prosecution's case (St. 897) and at the end of the trial. (St. 1183-1184) Petitioner's motion summarized the lack of prosecution justification for delay and the prejudice suffered by petitioner because of the delay which will be discussed in this statement of the case. (St. 228) The trial court denied petitioner's motion to dismiss in each instance.

Petitioner's timely appeal to the Washington State Court of Appeals resulted in the opinion set forth at Appendix B, in which the Court of Appeals rejected petitioner's assignment of error that the pre-accusation delay in prosecution resulted in violation of petitioner's right to Due Process under the *Fourteenth Amendment* (Appendix B, pp. 2-5). Petitioner's timely Petition for Review to the Washington State Supreme Court; in which he assigned the same violation of Due Process as a question for review, was denied by the order printed at Appendix A.

B. Factual Background

Petitioner's wife and daughter were killed on July 6, 1966. Petitioner was the only suspect when the Coroner's jury concluded that it knew the identity of the murderer. (St. 15) More than five years later the State formally charged petitioner with the murders. (Tr. 28) The evidence against petitioner was entirely circumstantial. Nothing linked him directly to the murders. (Appendix C-3) No new evidence was obtained during the intervening five years and the State asserts no justification for the delay except for a difference of opinion in the prosecutor's office as to whether there was sufficient evidence to charge the petitioner with the crimes. (Appendix B-2, C-6)

Petitioner testified at trial, denying all accusations against him. The testimony which petitioner had remaining available to him at trial indicated that at the time of the murders petitioner and his wife and daughter were a close and loving family (St. 558, 609, 860, 863, 869, 1065, 1066, 1010-1012); that petitioner and his wife were both troubled by prowlers in the neighborhood (St. 560, 566, 1026-1029); and that Harmon, a man who had a history of mental illness, blackouts while drinking, and violence, and who had been emotionally involved with petitioner's wife, could not substantiate his whereabouts when the murders were committed. (St. 448-462, 786-788)

As a result of the delay between the time of the murders and the time of the trials, at least the following consequences resulted to petitioner:

(a) The sheriff's office lost the tape recording of approximately eight hours of interrogation of the petitioner on the date of the murders. (St. 277, 732) The sheriff's office had not lost the notes which it, unlike petitioner, had made of the interrogation. The State was permitted to read directly from these notes as a means of impeaching petitioner's recollection of what he told the officers on that day. (St. 965-980, 985, 990, 1000) The impeachment involved such critical issues as doubts about the paternity of the murdered daughter (St. 971-981); incriminating knowledge about how the murders were committed (St. 999, 1000, 1004, 1011), and contradictions in testimony. (St. 732, 923) Petitioner's lack of notes and the absence of the tape recorder eliminated the possibility of substantiating that petitioner's recollection of the conversations was the correct one. (St. 933, 934)

(b) The only individual who testified to threats by the petitioner against his wife was Harmon, the unstable individual who had been emotionally involved with petitioner's wife. The sheriff's office lost a letter from Harmon in which he indicated that he had not been truthful at the Coroner's Inquest. (St. 408-410, 414-416) As a result the letter could not be used to impeach this witness.

(c) The cancelled check for wages which could have established the location of Harmon on the date of the murder was lost in a flood which took place in 1972. (St. 786)

(d) The prosecution devoted a substantial portion of its cross examination of the petitioner to convincing the jury that petitioner's testimony was not reliable because of his inability to recall details of relevant events. (St. 952, 953, 956-959, 976, 977, 986, 988, 989, 991, 992, 1000, 1004, 1009, 1011, 1012, 1014, 1015, 1019). These significant details involved a substantiation of petitioner's testimony that he was ill and thus sleeping in a different part of the house at the time of the murders, that he had seen a prowler the afternoon before the murders, that he had no lingering doubts regarding his daughter's paternity, that his wife had discovered the phone out of order and he accidentally discovered cut telephone wires the day of the murder, and details of how he discovered the deaths of his wife and daughter. The delay in trial resulted in the inability of the petitioner to answer these detailed questions by the prosecutor.

(e) By the time of the trial, both doctors who had cared for petitioner's wife during her pregnancy with the murdered daughter were dead and thus were unable to

testify that petitioner's wife was not pregnant by her former lover and that petitioner and his wife Judy were a loving couple. (St. 6, 865; Tr. 2022 Re: Dr. Penny; St. 7, 8, 864, Tr. 13 Re: Dr. Mudge) Pregnancy by another man was the prosecution's motive for petitioner killing his daughter.

(f) The Haga's family priest, who would have testified to the lack of any current marital problems between petitioner and his wife and further undercut the prosecution's motive for petitioner killing his wife, had left the area and could not be located. (St. 8, Tr. 22)

(g) A family friend who was with petitioner and his wife and children on the days immediately preceding the murder and who would have substantiated the good relationship between all of them, died in 1970. (St. 10)

(h) The insurance agent who wrote the insurance which the prosecution contended petitioner put on his wife and daughter in order to monetarily benefit from their deaths was unable to recall whether the insurance was sought jointly by petitioner and his wife, as contended by the defense (St. 876, 877), or just by the petitioner as contended by the prosecution. (St. 495, 498, 502, 509) Nor could the insurance agent recall when the insurance inquiry was made (St. 509), which would have supported petitioner's testimony.

(i) The doctor who first examined the victims at the scene of the murders was no longer able to recall and testify effectively as to his observations establishing the time of death and could not completely verify his written statement made at the time. (Tr. 22, St. 1080-1082, 1094,

1096-1098, 1104-1106, 1108, 1109, 1185) His testimony placing the time of death significantly later than the prosecution was critical to establish that a person seen in the window of the Haga house was the unknown killer and not the petitioner.

(j) A neighbor who saw a person in the window of the Haga home at 6:45 a.m. on the day of the murders revised his direct testimony from his statement made immediately after the deaths. According to the first statement, the neighbor had seen what could have been a man wearing a hat and coat in the window. His direct testimony five years later was that the person he saw was a man dressed in a bathrobe. (St. 724-729) Petitioner wore a bathrobe, but not a coat and hat, the morning of the murder.

(k) A fellow employee of the petitioner could not be located. The employee would have substantiated the petitioner's testimony that he gave a message to his office on the day before the murders which corroborated the fact that the petitioner was ill and thus sleeping in another room and unaware of the attack on his wife and daughter. (St. 9, 529, 531)

(l) The detectives who investigated the crime could not recall who had examined the unidentified footprints outside the Haga home and what the results of the examination were. (St. 689-691, 719, 720) There had been substantial testimony about prowlers in the area. (St. 559, 560, 611, 1026-1029)

VI.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in conflict with the applicable decisions of this Court and is in violation of petitioner's right to Due Process under the Constitution of the United States.

Although petitioner was not formally charged by Information until 60 months after the Coroner's Jury found that it knew who the murderer was, the Coroner's Jury finding was the equivalent of indictment in terms of the anxiety and concern discussed by this Court in *Barket v. Wingo*, 407 U.S. 514, 33 L. Ed.2d 101, 92 S.Ct. 2182 (1972). Petitioner was the only suspect considered by the authorities at the time of the Coroner's Jury finding and during the entire five years the State forced petitioner to live under this cloud without formalizing the charge. This case is virtually unprecedented for the length of the delay, the failure to justify the delay, and the intensity of accusation right from the day of the murders.

The state court below acknowledged that this Court, in *United States v. Marion*, 404 U.S. 307, 324-325, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971), proposed a flexible test for determining when actual prejudice resulting from pre-indictment delay requires the dismissal of a prosecution under the Due Process clause. The court below adopted the more prevalent view that the Due Process test proposed by this Court requires the dismissal of a criminal prosecution when actual prejudice from the delay is shown and the prosecutor has no reasonable justification for that delay, (Appendix C4-5, B-2), citing *United States v. Hauff*,

461 F.2d 1061 (7th Cir. 1972); *United States v. Iannelli*, 461 F.2d 482 (2d Cir. 1972); *United States v. Mones*, 336 F. Supp. 1320 (S.D. Fla. 1972). This rule is supported by *Hamilton v. Lumpkin*, 389 F. Supp. 1069 (1974); *Jones v. Superior Court of Los Angeles*, 91 Cal. Rptr. 578, 478 P.2d 10 (1971); *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1968); *Robinson v. United States*, 459 F.2d 847 (D.C. Cir. 1972).

Because the appellate court below ruled that the prosecution asserts no justification for the five year delay, and the court itself found no justification, (Appendix B-2, C-6, 7) the only issue remaining to be decided by the state appellate court was the existence of actual prejudice to the petitioner.

Unfortunately, the court below actually violated the *Marion* test it had recognized by requiring that the quality of the actual prejudice demonstrated by petitioner be weighed against the "legislative intent" expressed by the absence of any statute of limitations whatsoever on the crimes with which petitioner is charged. The first state appellate decision to consider the actual prejudice suffered by petitioner held:

> "The allegations of prejudice in this case do not overcome the absence of any statute of limitations concerning the crime of murder in the first degree. We hold that the actual prejudice must be sufficient to overcome the legislative intent expressed by the absence of limitation on prosecution for such a crime, before the prosecution be forbidden. The showing of actual prejudice is insufficient to amount to a denial of Due Process when subjected to that criteria." (Appendix C-9)

The state appellate court decision with which this petition

is concerned adopted the first decision's analysis of the actual prejudice suffered by petitioner. (Appendix B-4) It also stated:

> "Haga asserts that 'the only proper factor to balance against prejudice to the defendant from delay is any reasonably prosecutorial justification that might exist for that delay.' We do not agree." (Appendix B-3)

The analysis of the court below is faulty for two reasons. In the first place, this Court in *United v. Marion, supra* at 322, 323, held that statutes of limitations function to establish an irrebuttable presumption of prejudice, whether or not actual prejudice is demonstrated. This Court did not hold, where actual prejudice has been demonstrated under the Due Process test for dismissal due to delay, that whatever legislative intent might be gleaned from a statute of limitations must be balanced against the actual prejudice to determine whether there is a high enough degree of actual prejudice.

Secondly, state statutes cannot take precedence over the Due Process Clause of the Fourteenth Amendment. It is inappropriate for the court below to argue that a state enactment, which eliminated the protection of a statute of limitations (RCW 10.01.020) and leaves the entire burden of protecting petitioner on the Due Process Clause of the Fourteenth Amendment, somehow increases the amount of actual prejudice which must be demonstrated by petitioner to fall under the protection of the Fourteenth Amendment.

The court below further compounded its error when it relied upon the determination of the trial court and the first Haga appellate decision that the petitioner was not actually prejudiced in a great enough degree by the de-

lay. (Appendix B-4, 5) When constitutionally protected rights such as due process are involved, the appellate court must make an independent examination of the facts and not rely upon conclusions reached by another court. *Napue v. Illinois,* 360 U.S. 264, 3 L. Ed.2d 1217, 79 S. Ct. 1173 (1959) determined this precise point in reviewing a state violation of the Due Process Clause of the Fourteenth Amendment. The rule enunciated by this Court is:

> "When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record." *Codis Poti v. Pennsylvania,* 418 U.S. 506, 517 Note 6, 94 S. Ct. 2687, 41 L. Ed.2d 912 (1974).

In fact, the prejudice suffered by petitioner exactly fits the definition of prejudicial effect summarized by *United States v. Golden,* 436 F.2d 941, 943 (8th Cir. 1971):

> "In determining the prejudicial effect of a pre-indictment delay, the governing standard is whether the delay has impaired the defendant's ability to defend himself. e.g. *United States v. Ewell,* 383 US 116, 86 Supreme Court 773, 15 L. Ed.2d 627 (1966); *Hodges v. United States,* 408 F.2d 543 (8th Cir. 1949); *United States v. Deloney,* 389 F.2d 324 (7th Cir. 1968); *United States v. DeLeo,* 422 F.2d 487 (1st Cir. 1970); *Bradford v. United States,* 413 F.2d 467 (5th Cir. 1969) . . . In Hodges [supra] the Court speaking through then Judge Blackmun, now Justice Blackmun, concluded that to establish a claim of impairment, the defendant must point to specific evidence which has actually disappeared or been lost or witnesses known to have disappeared."

This same criteria has been most recently applied in the Eighth Circuit to a 47 month pre-indictment delay in which witnesses had died and other witnesses had difficulty re-

membering relevant facts. *United States v. Barket,* 18 Cr. L.2429 (Jan. 28, 1976) The *Barket* Court acknowledged that the defendant could only allege that the missing witnesses and impaired testimony would have favored his defense. The court held that it was up to the Government to bear the burden of demonstrating that the missing witnesses did not possess exculpatory evidence. *Barket, supra,* 18 Cr.L.2431 citing *United States v. Norton,* 504 F.2d 342 (8th Cir. 1974) (Cert. denied, 419 U.S. 1113 (1975)).

In the case before this Court, the delay in prosecuting petitioner was more than 60 months before the first trial and seven years before his second trial. The prejudice suffered falls exactly in the category outlined in *United States v. Golden, supra*: defense witnesses had died, defense evidence in possession of the police had been lost, defense witnesses could not be located, and the recollection of those witnesses who did remain was severely impaired.

Petitioner's testimony was impeached by comparing his unaided recollection with the written notes made by the police on the day of the crime. The loss of the police tape recording of the interrogation prevented petitioner from showing that the notes were slanted and biased to serve the purposes of an interrogator. Petitioner's testimony was further impeached by his inability to recall details of relevant events, all of which materially aided the State in its efforts to destroy petitioner's credibility and gain a conviction.

The location of Mr. Harmon, whom petitioner sought to show may have been the murderer, on the day of the murders could not be established because of lost records.

Harmon's testimony could not be impeached because the police lost the letter written by Harmon in which Harmon recanted his Coroner's inquest testimony. An attack on the very motives for the crime could not be effectively mounted because the doctors who would have testified that there was no doubt about the paternity of the murdered child were dead, and the family priest and neighbor who would have testified to the reconciliation between petitioner and his wife could not be located or had died. Petitioner's rebuttal of the State's claim that petitioner had originated life insurance on his murdered wife and child in order to gain enough money from the murders to purchase a particular car could not be substantiated because of the impaired recollection of the insurance agent.

And, as a final example from the many which exist from the trial record, petitioner's ability to establish the time of death as being approximately 6:30 a.m.—rather than between midnight and 2 a.m. as the prosecution contended—was drastically impaired by the poor memory of the doctor who examined the body. The time of death was critical because if it occurred as early as the prosecution contended the only person who could have been seen in the Haga house by a neighbor at 6:45 a.m. would have been the petitioner rather than the murderer. This would have meant that petitioner lied when he testified that he immediately reported the disaster when he discovered it. And if petitioner had delayed in reporting the crime, the delay would have dramatically pointed to the petitioner as the murderer.

Finally, it is ironic that the court below further increased the petitioner's burden for establishing actual prejudice by not only balancing the actual prejudice he

established against the absence of a statute of limitations, but also balancing the actual prejudice which petitioner established against a possibly weakened State's case due to the passage of time:

> "Because of her unique opportunity to judge witness credibility and sense the atmosphere of the trial, the the trial judge could best estimate the probable effect of possible evidence lost to Haga by reason of the passage of time. This is especially true in this case because the State's evidence was essentially circumstantial as was the evidence assertedly lost to Haga. As pointed out in *United States v. Marion* at page 322, 'Possible prejudice is inherent in any delay, however short; it may also weaken the government's case.' Judicial assessment of the "relative interest" of the State and *Haga* necessarily involve a delicate judgment." (Appendix B-5)

In the briefs submitted by the State to the court below, the State did not for the most part even attempt to argue that petitioner was not prejudiced, but rather conceded this prejudice by arguing that the State had been prejudiced as badly if not worse than petitioner by the delay.

There is no authority for the proposition that a trial which is constitutionally infirm due to the actual prejudice suffered by the defendant is somehow healed by being doubly infirm. On the contrary, *Robinson v. United States, supra*, 459 F.2d at 452, 453, carefully analyzed the cases which at that time had applied the Due Process test of prejudice and divided the types of actual prejudice found into two categories. The first category is the impaired ability of the accused to defend himself. This category is amply demonstrated in the case before this court. The second category, however, relates to the quality of the government's proof and the reliability of the techniques

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utilized to identify the criminal. The more unreliable the government's proof due to the delay of which the defendant complains, the greater is this category of actual prejudice to the defendant. In short, the Due Process test must be approached mindful of the risk that a conviction of an innocent person may result both because of the impaired ability of the accused to defend himself and the impaired quality of the government's evidence. *Robinson v. United States, supra,* 459 F.2d at 851.

Applying these categories of actual prejudice to the petitioner's case, it is evident on the record that petitioner's ability to defend himself has been actually impaired by the loss of witnesses, recollection, and evidence. This category of actual prejudice is evident even though the essence of the prejudice which petitioner has suffered is the very *lack of evidence* which would have been available, the content of which petitioner cannot unequivocally demonstrate because of the very fact that the evidence is missing. Petitioner does not claim to have proven that Harmon or any other individual committed the crimes. It was impossible to know by the time the charges were actually brought what evidence of other suspects might have been produced had the charges been timely. What petitioner has established is the substantial likelihood that the five year delay before his first trial and the seven year delay before his second trial has sealed the doors of knowledge and recollection that would have been available to him but for the delayed prosecution.

The second category of actual prejudice to petitioner is evident from the very reason for the delay in prosecution. The State's case was tenuous and circumstantial at

best. What was tenuous five years before the first trial and seven years before the second trial has become more tenuous and more unreliable due to the same losses of evidence and memory which have impaired the petitioner's defense.

The state appellate court below has improperly balanced the absence of a statute of limitations and the prejudice suffered by the prosecution against the actual prejudice suffered by the petitioner. Even in doing this, the court below failed to make an independent examination of the evidence of actual prejudice presented by petitioner. In so doing, the Washington Court of Appeals has corrupted and misapplied the protection against unreasonable pre-indictment delay afforded the petitioner by the Due Process Clause of the Fourteenth Amendment.

VII.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted and the decision of the court below should be reversed and the prosecution of this case dismissed.

March 1, 1976.

Respectfully submitted by:

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APPENDIX A

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

ERIC L. HAGA,

Petitioner.

No. 43987
(2762-I)

ORDER

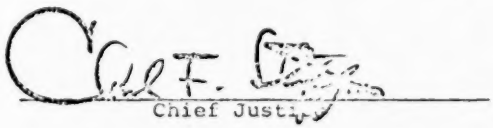
DENYING PETITION FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause, together with the answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 11th day of December, 1975.

By the Court:



Chief Justice

13 Wn. App. 630

APPENDIX B

[No. 2762-1. Division One. June 9, 1975.]

THE STATE OF WASHINGTON, *Respondent*, v. ERIC L. HAGA, *Appellant*.

[1] Criminal Law—Trial—Time of Trial—Delay Prior to Arrest and Charge—Absence of Limitation—Effect. The absence of a statute of limitation as to a particular crime reflects a State interest that prosecution of such crime be barred for delay only upon a special showing of actual prejudice. Such a requirement is consistent with due process concepts when the showing of prejudice is evaluated by the trial judge in the light of the facts and circumstances of the particular case.

[2] Criminal Law—Trial—Opening Statement—Evidentiary Support—Sufficiency. An opening statement need not be limited to an outline of direct evidence, but may include matters supported by reasonable inferences from circumstantial evidence.

[3] Evidence—Hearsay—State of Mind—In General. Evidence of out-of-court statements is not hearsay when admitted for the limited purpose of showing the state of mind of the maker of the statement or of someone who hears it.

[4] Jury—Peremptory Challenges—Capital Cases—What Constitutes. First-degree murder is not a capital offense, for purposes of CrR 6.4(c)(1) which allows 12 peremptory challenges in a prosecution for such an offense, unless the punishment of death may be validly imposed.

[5] Jury—Peremptory Challenges—Constitutional Requirements. The constitutional right to an impartial jury does not require peremptory challenges in any criminal trial.

Greenwood, contrary to the meaning of the word "additional" in the statute, declined to submit to the breathalyzer until the arresting officer had acceded to his request for a blood test, and not upon the fact that Greenwood was not willing to take the breathalyzer until 1:10 a.m., some 2 to 3 hours after his initial refusal to do so.

Appeal from a judgment of the Superior Court for King County, No. 58185, Janice Niemi, J., entered January 21, 1974. *Affirmed.*

Prosecution for murder. The defendant appeals from a conviction and sentence.

Murray B. Guterson, Edwards & Wetherall, Malcolm L. Edwards, Richard L. Barbieri, Richey & Hohlbein, and *Jack A. Richey,* for appellant.

Christopher T. Bayley, Prosecuting Attorney, and *Thomas H. Wolfendale, Deputy,* for respondent.

JAMES, J.—By jury verdicts, defendant Eric L. Haga has twice been found guilty of the premeditated murders of his wife and infant daughter. His first conviction was reversed because of trial error not relevant to this appeal. *State v. Haga,* 8 Wn. App. 481, 507 P.2d 159 (1973). The evidence introduced at each trial was substantially the same and is summarized in the first appeal opinion.

In his first appeal and again in this appeal, Haga has assigned as error the trial judge's refusal to dismiss the charges against him on the ground that preaccusation delay denied him constitutionally guaranteed rights to due process of law. The homicides occurred on July 6, 1966, but Haga was not charged until August 30, 1971. The State asserts no justification for the 5-year delay.

Haga's claim was rejected in his first appeal. He contends that in rejecting his claim, this court recognized, but failed to apply, the "rule" that "a criminal prosecution must be dismissed when actual prejudice from the delay is shown and the prosecutor had no reasonable justification for the delay." In Haga's first appeal, it is stated that:

> The justification for the delay must be balanced against prejudice to the defendant's ability to offer such evidence as there is in his defense.

State v. Haga, supra at 487. The court found, however, that while there was, in fact, no prosecutorial justification for delay, Haga's claims of prejudice did not "overcome the

legislative intent expressed by the absence of a limitation on prosecution" for the crime of murder in the first degree. *State v. Haga, supra* at 489.

Haga argues that the court "misconceived the role of the lack of a statute of limitations for murder" and

> erred in its application of the due process guarantee to the extent that this court balanced the prejudice to the defendant against whatever legislative intent might be gleaned from the absence of a statute of limitations for murder.

Haga asserts that "[t]he only proper factor to balance against prejudice to the defendant from delay is any reasonable prosecutorial justification that might exist for that delay."

We do not agree.

[1] In *United States v. Marion*, 404 U.S. 307, 321, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971), the United States Supreme Court declined to "extend the reach" of the Sixth Amendment's guaranty of a speedy trial "to the period prior to arrest" but left open the Fifth Amendment "due process" question of "when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." *United States v. Marion, supra* at 324.

The court pointed out that statutes of limitations specify the "limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced" and that "[s]uch statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice." (Footnote omitted.) *United States v. Marion, supra* at 322.

We do not read the opinion in the first *Haga* appeal to require a "balancing" of Haga's claims of prejudice against "the legislative intent expressed by the absence of a limitation on prosecution" for the crime of murder. *State v. Haga, supra* at 489. When read in its entirety, it is clear that the holding is that the "interests of the State," *United States v. Marion, supra* at 322, as reflected by the absence

of a statute of limitations, require that proof of "actual" prejudice be "specially demonstrated" and not "be based upon speculation.'" *State v. Haga, supra* at 489. Significantly, Washington's criminal limitation of actions statute *affirmatively* provides that prosecutions for murder "may be commenced at any period after the commission of the offense." RCW 10.01.020.

In the first appeal, 10 "instances" relied upon by Haga to demonstrate "actual prejudice" were considered. The court concluded that "upon an evaluation of the entire proceedings the showing is short of actual prejudice." *State v. Haga, supra* at 489. We adopt the first appeal analysis of Haga's claims and its conclusion that Haga did not demonstrate actual prejudice.

At the second trial, Haga asserted three additional claims of prejudice related to the unavailability of witnesses. The trial judge considered the additional claims together with the 10 instances discussed in the first appeal. She first observed that she was satisfied that the further delay occasioned by the necessity for a second trial did not prejudice Haga. She pointed out that Haga's additional claims were similar to those considered in his first appeal and concluded that his claim of actual prejudice was not justified. We agree.

The administration of criminal justice is not susceptible of scientific methodization. "Due process" is an abstract concept. In the absence of a limitation statute to provide "predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced," (Footnote omitted.) *United States v. Marion, supra* at 322, a criminal defendant's claimed deprivation of due process because of "actual prejudice" can best be evaluated by the trial judge.

> To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.

United States v. Marion, supra at 325.

Because of her unique opportunity to judge witness credibility and to sense the atmosphere of the trial, the trial judge could best estimate the probable effect of possible evidence lost to Haga by reason of the passage of time. This is especially true in this case because the State's evidence was essentially circumstantial as was the evidence assertedly lost to Haga. As pointed out in *United States v. Marion* at page 322, "[p]ossible prejudice is inherent in any delay, however short; it may also weaken the Government's case." Judicial assessment of the "relative interests" of the State and Haga necessarily involved a "delicate judgment." Our review of the record of the trial persuades us that the trial judge did not err in concluding that Haga failed to demonstrate that he was actually prejudiced by the preaccusation delay.

Haga also assigns as error the trial judge's refusal to declare a mistrial "on the grounds of prosecutorial misconduct in the prosecution's opening statement." He asserts that the statement was argumentative and inflammatory; was replete with intentional misstatements of the evidence; and that it improperly contained expressions of personal belief of the prosecutor concerning evidence offered.

As was pointed out in the first appeal opinion, "No evidence linked the defendant directly to the murders although it is undisputed that he was in the house during the night of the crimes." *State v. Haga, supra* at 483. The State, however, produced evidence of circumstances that arguably demonstrates both a motive and a plan to manufacture false evidence of an unknown prowler who committed the murders. At the point in the prosecutor's opening statement where he first spoke of a "plan" to "mislead the police," Haga's counsel objected that "[T]here is no witness that is going to say this. This is fine for him to argue some time next week but this is not—unless he can say somebody is going to say this." In the absence of the jury, the prosecutor contended that his legitimate purpose was to outline for the jury the matters which the State expected to prove by either direct or circumstantial evidence. The trial judge

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cautioned the prosecutor that his statement should be limited to an outline of what the State intended to prove. The jury was recalled.

Subsequently, the prosecutor reached a point in his opening statement where he asserted that the State's evidence would establish that Haga strangled his wife with a necktie. At this point, Haga's counsel objected, and the trial judge again excused the jury. Haga's counsel then moved for a mistrial arguing that, "There is nobody that is going to come in and say that I saw Eric put a necktie around her neck or that she was putting up her hair." Haga's counsel stated that he moved for a mistrial "on the basis of the prosecutor's conduct in disregarding what I think every lawyer responsibly knows is the purpose of an opening statement." He further asserted that the prosecutor was making an argument rather than an opening statement. The motion for a mistrial was denied at this point and was not again renewed.

[2] In *State v. Aiken*, 72 Wn.2d 306, 434 P.2d 10 (1967), our Supreme Court considered a similar claim of error. It was contended on page 351 that the prosecutor's opening statement description of

> the manner in which the shots were fired at the time one of the victims was attempting to rise from the floor; . . . was highly inflammatory and prejudicial, resulting in a denial of a fair trial to the defendants.

As in this case, the prosecution's evidence concerning the homicides was entirely circumstantial. In rejecting the claim, the court said at page 351:

> The prosecuting attorney was entitled to make such statements as long as they were supported by evidence or reasonable inferences therefrom, and were material to the issues of the case. The record discloses that evidence was introduced which, with the reasonable inferences therefrom, supported these statements by the prosecutor.

The court also noted that the prosecutor's statements "were prefaced with the warning that they were not evidence but

an outline of what the state intended to prove at the trial." *State v. Aiken, supra* at 351.

In concluding his opening statement in this case, the prosecutor said:

> Now, those are the facts as I expect to be able to prove them to you. What I say is not evidence and if the facts come out different, and there is going to be disputes about these facts, if the witnesses tell you something that is not borne out by what I say or if they contradict what I say, well you disregard what I say completely because I'm not a witness and I'm not here to give evidence. The evidence will come from the witness chair and the witnesses will give the evidence. So, if I can't prove everything I have said, you just disregard it completely.

Based upon our review of the record of the trial, we do not find the opening statement to be argumentative, inflammatory, replete with misstatements, or to contain expressions of the personal belief of the prosecution. The trial judge did not err.

Haga further assigns error to the admission of "the hearsay testimony of a prosecution witness (Velma Peterson) and then allowing another prosecution witness to contradict the content of that hearsay testimony." Haga states his contention as follows:

> Velma Peterson's testimony must be divided into two parts, "simple hearsay" and "double hearsay." In the simple hearsay part, the trial court allowed Mrs. Peterson to testify to what Eric purportedly told her of his direct knowledge about Judy's association with Mr. Harmon. In the double hearsay part, the trial court allowed Mrs. Peterson to testify concerning what Eric allegedly told her about what Mrs. Matuska allegedly told him. After Mrs. Peterson testified, the prosecution then had Mrs. Matuska testify that none of the events described by Mrs. Peterson had ever occurred and that she had never told Eric that they had occurred. We are here concerned only with the double hearsay portion of Mrs. Peterson's testimony and the testimony of Mrs. Matuska. Mrs. Peterson's and Mrs. Matuska's testimony was admitted over the continuing objection of the defense.

Mrs. Peterson testified that Eric told her that Mrs. Ma-

tuska had told him of an occasion when she (Mrs. Matuska) and Judy (Haga's wife) "had gone to a few bars or taverns and that Judy had met somebody and taken off and they had chased her all over until they caught up with her. . . . on her way to a hotel room." Mrs. Matuska testified that the incident related in Mrs. Peterson's testimony had not occurred and that she had not told Eric of any such occurrence.

[3] The State's contention at trial was that the testimony was offered, not to prove the truth of the *content* of Mrs. Matuska's purported tattling about Judy, but that the testimony was relevant and, therefore, admissible as evidence of Haga's state of mind. Mrs. Peterson's testimony that Haga had made a statement to her was, of course, not hearsay. Evidence is inadmissible as hearsay only if the testimony in court of a statement made out of court is offered to prove the truth of the matter asserted in the out-of-court statement. 5 R. Meisenholder, Wash. Prac. § 381, at 374 (1965).

Motive is a relevant issue in a homicide prosecution. As a part of its case, the State presented evidence that Haga knew that his wife had been unfaithful and that he questioned the paternity of his murdered daughter. His state of mind was relevant and material to the issue of motive.

> Evidence of out-of-court statements may also be pertinent to prove mental or emotional states or conditions of persons who heard them. For this purpose the evidence is not hearsay. The statement is not introduced to prove its truth but to support an inference concerning its effect on the hearer regardless of its truth. The truth of the statement should then be immaterial.

(Footnotes omitted.) 5 R. Meisenholder, Wash. Prac. § 383, at 389 (1965). The trial judge did not err in admitting the testimony of Mrs. Peterson and Mrs. Matuska.

Haga's final contention is that the trial court erred by limiting him to six peremptory challenges when the jury was selected. He first contends that CrR 6.4(c)(1) "provides on its face" that he was entitled to 12 peremptory challenges.

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Without change significant to Haga's contention, CrR 6.4(e)(1) superseded RCW 10.49.060. The relevant portion of the rule is as follows:

> In prosecutions for capital offenses the defense and the state may challenge peremptorily twelve jurors each; in prosecution for offenses punishable by imprisonment in a penitentiary six jurors each; in all other prosecutions, three jurors each.

Haga asserts that by charging him with first-degree murder, the State undertook to prosecute him for a "capital offense."

[4] Haga recognizes that subsequent to his first trial and prior to his second trial, our Supreme Court in *State v. Baker*, 81 Wn.2d 281, 282, 501 P.2d 284 (1972) held that RCW 9.48.030, "which sets forth the circumstances and procedures by which the death penalty may be imposed in Washington" for premeditated murder, is unconstitutional as a result of the holding of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972). Haga also acknowledges that in *State v. Johnston*, 83 Wash. 1, 144 P. 944 (1914), it is squarely held that a defendant charged with first-degree murder was entitled to only six peremptory challenges under Rem. & Bal. Code, § 2138[1] because, at the time of trial, capital punishment had been abolished by this state.

The rationale of *State v. Johnston*, *supra* at 2-3 is:

> It is clear that the twelve challenges are only allowed in prosecutions for capital offenses. A capital offense is one which may be punishable with death. Black's Law Dictionary (2d ed.), p. 167. *Ex parte Walker*, 28 Tex. App. 246, 13 S. W. 861; *Ex parte McCrary*, 22 Ala. 65; *Ex parte Dusenberry*, 97 Mo. 504, 11 S. W. 217. The statute above quoted obviously uses the term "capital offenses" as so defined. The second clause, by allowing only six peremptory challenges in prosecutions for offenses pun-

[1]Rem. & Bal. Code, § 2138 is the progenitor of RCW 10.49.060 and CrR 6.4(e)(1). It provided: "In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors."

ishable by imprisonment in the penitentiary, in effect defines such offenses as not capital. . . . Since there is now no capital punishment in this state, there are no capital offenses, hence no offense in prosecution for which the provision for twelve peremptory challenges can be invoked. No amount of argument could add to the clear sequence of this conclusion.

Haga contends, however, that the definition of "capital offense" was "substantially altered" in *State v. Haga*, 81 Wn.2d 704, 504 P.2d 787 (1972).[2] The issue in the case is stated at page 706:

> The sole question in this case is whether the legislature intended a limitation on a defendant's right to bail, upon his conviction of first-degree murder, by reason of the nature of the crime and seriousness of the offense for which he has been convicted, or by reason of it being a capital case in which the death penalty could be inflicted.

(Italics ours.)

The court reasoned at page 707

> that the removal of the death penalty in no way affected the nature of the crime or the seriousness of the offense. It was the nature of the crime and seriousness of the offense which, we believe, the legislature had in mind when bail was limited on appeal in capital cases.

The court concluded that RCW 10.73.040,[3] which governs the right to bail pending appeal, requires the trial court, following a first-degree murder conviction, to determine whether "the proof of guilt is clear or the presumption great" for the purpose of deciding whether the appellant should be released on bail. The court determined that *State v. Johnston, supra*, was "distinguishable" because

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[2] *State v. Haga*, 81 Wn.2d 704 is not a Supreme Court review of the opinion in *State v. Haga*, 8 Wn. App. 481. Review of Haga's first trial was denied by the Supreme Court on June 20, 1973.

[3] "In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant; . . ."

> the concern of the legislature, in granting the defendant 12 peremptory challenges in a capital case, was directly related to the seriousness of the *penalty* with which the defendant was confronted, rather than the seriousness of the crime with which she was charged.

(Italics ours.) *State v. Haga*, 81 Wn.2d at 708.

[5] Haga further contends that "protection of the right to an impartial jury trial requires twelve peremptory challenges." He reasons that because Const. art 1, § 21 and Const. art. 1, § 22 (amendment 10) of Washington's constitution guarantee an "inviolate right" to trial by an impartial jury, and because CrR 1.1 provides in part that "[t]hese rules shall not be construed to affect or derogate from the constitutional rights of any defendant," he should have been afforded 12 peremptory challenges as he was in his first trial.

In *State v. Persinger*, 62 Wn.2d 362, 365-66, 382 P.2d 497 (1963), it is pointed out that neither the United States Constitution nor the Washington Constitution

> requires congress or a state legislature to grant peremptory challenges to an accused. Nor does either constitution provide for any particular method of securing to an accused the right to exercise the peremptory challenges which a legislative body grants him. *Holmes v. United States*, 134 F. (2d) 125 (1943); *Philbrook v. United States*, 117 F. (2d) 632 (1941); 31 Am. Jur. Jury § 230. The matter of peremptory challenges rests entirely with the legislature. *People v. Kassis*, 145 Misc. 493, 259 N.Y.S. 339 (1931); *People v. Doran*, 246 N. Y. 409, 159 N. E. 379 (1927); 31 Am. Jur., Jury § 230. It is limited only by the necessity of having an impartial jury. 31 Am. Jur., Jury § 230.

Consistently, Washington's legislature has provided that only an accused who faces a possible death penalty is to be afforded 12 peremptory challenges. The trial judge did not err in holding that first-degree murder was not a capital offense at the time of Haga's second trial and that he was, therefore, entitled to only six peremptory challenges.

Affirmed.

WILLIAMS, C.J., and ANDERSEN, J., concur.

APPENDIX C

8 Wn. App. 481, 507 P.2d 159

[No. 1477-1. Division One—Panel 1. March 5, 1973.]

THE STATE OF WASHINGTON, *Respondent*, v. ERIC L. HAGA, *Appellant*.

[1] **Criminal Law—Trial—Time of Trial—Delay Prior to Arrest and Charge—Constitutional Standards.** Delay prior to the arrest of and accusation against an accused, whether intentional or merely not justified, may be grounds for dismissal of the charge if it actually prejudices the defendant. The constitutional guarantee involved is that of due process, rather than speedy trial, and while the length of the delay and reasons therefor are significant, no question of the defendant asserting his right is involved, and consideration of the question of prejudice is substantially limited to impairment of his ability to defend.

[See 21 Am. Jur. 2d, Criminal Law § 248.]

[2] **Criminal Law—Trial—Time of Trial—Delay Prior to Arrest and Charge—Justification.** Delay in the arrest of a person suspected of a crime may be justified by the complexity of the case, its effect on further law enforcement, or the initial lack of sufficient evidence; whatever justification is offered, however, must be balanced against the prejudice to the defendant's ability to defend.

[3] **Criminal Law—Trial—Time of Trial—Delay Prior to Arrest and Charge—Prejudice—Evidence.** An accused must specifically demonstrate actual prejudice to his defense resulting from pre-accusational delay in order to obtain dismissal of criminal charges for denial of his rights to constitutional due process.

[4] **Homicide—Criminal Law—Trial—Time of Trial—Delay Prior to Arrest and Charge—Prejudice—Degree.** Any showing of actual prejudice to an accused's defense resulting from pre-accusational delay in a prosecution for murder must be sufficient to overcome the legislative intent respecting prosecution for such crimes as evidenced by the absence of a statute of limitations.

[5] **Criminal Law—Evidence—Opinion as to Guilt—Propriety.** Testimony by a witness in a criminal trial which, directly or inferentially, communicates the witness' opinion as to the guilt of an accused intrudes into the province of the trier of fact and is erroneous.

[6] **Criminal Law—Appeal and Error—Harmless Error—Test.** A prejudicial error is one which affects or presumptively affects the final results of the trial. Error cannot be deemed harmless when the appellate court is unable to determine whether the accused would or would not have been convicted but for the error committed.

[7] **Criminal Law—Trial—Conduct of Counsel—Prosecutor's Duty—Disclosure of Facts to Defendant.** The prosecutor in a criminal action, as a part of his affirmative duty to assure that an accused is

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afforded a fair trial, is responsible for disclosing to the accused material evidence favorable to him when the prosecution has reason to believe such evidence is unknown to the accused. Failure to so disclose is error.

[8] **Criminal Law—Evidence—Photographs—Admissibility—Test.** Photographs are tested for admissibility by exercise of the trial court's discretion in determining whether their probative value outweighs their probable prejudicial effect.

[9] **Evidence—Hearsay—Admissions—Self-serving Admissions.** Out-of-court admissions of a party are not admissible as an exception to the hearsay rule when they are self-serving.

Appeal from a judgment of the Superior Court for King County, No. 58185, Howard J. Thompson, J., entered February 10, 1972. *Reversed and remanded.*

Prosecution for murder. The defendant appeals from a conviction and sentence.

Barokas, Martin & Richey, Jack A. Richey, and *Larry L. Barokas,* for appellant.

Christopher T. Bayley, Prosecuting Attorney, and *Lee D. Yates, Deputy,* for respondent.

CALLOW, J.—Defendant appeals from a jury conviction of the first-degree murders of his wife and infant daughter.

The deaths occurred in the early morning of July 6, 1966. The defendant has maintained since that date that he was asleep in the bedroom of their rented home and awoke in the morning to find his wife and the youngest of two daughters strangled. A neighbor testified that the defendant appeared at his door on the morning in question and said, "there was something wrong with Judy." The neighbor accompanied the defendant into the house and found the wife's body in the living room, where, according to the defendant's testimony, she had slept that night because neither was feeling well. The body of the infant girl was found in a bedroom.

The state introduced evidence that the Hagas had been separated in the summer of 1965 and that Mrs. Haga had lived with another man for a short period of time prior to

their reconciliation. Evidence was introduced concerning the issuance of life insurance on the family, and other evidence was admitted showing that the defendant had lied on a loan application in an attempt to secure extra money for the purchase of a sports car. There was testimony that there had been several instances of prowlers in the neighborhood, and a prowler had been seen the afternoon of the crimes. A neighbor testified that he saw a man in the Haga living room about 6:40 a.m. wearing what appeared to be a coat. No evidence linked the defendant directly to the murders although it is undisputed that he was in the house during the night of the crimes. The time of the deaths was approximated as between midnight and 4 a.m.

DELAY IN PROSECUTION

The defendant contends that the delay from the commission of the crimes to the commencement of prosecution, a period of over 5 years, amounted to a denial to him of due process of law under the federal and state constitutions.

Any inquiry into delay in criminal prosecutions must begin with the relevant statute of limitations. "[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122, 15 L. Ed. 2d 627, 86 S. Ct. 773 (1966). There is no statute of limitations on murder in Washington. RCW 10.01.020.

The problem of "pre-arrest" or "pre-accusation" delay of a duration less than the relevant statute of limitations as potentially violative of constitutional safeguards is one with which the Supreme Court has only recently been concerned.

In *United States v. Marion*, 404 U.S. 307, 322, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971), the majority held that the Sixth Amendment guarantee of a speedy trial did not apply to delays prior to indictment or arrest. In a concurring opinion, three justices argued that the speedy trial guarantee should apply. The opinion of the majority said:

> The law has provided other mechanisms to guard against possible as distinguished from actual prejudice

resulting from the passage of time between crime and arrest or charge. . . . [Statute of limitations] represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence." *Public Schools v. Walker*, 9 Wall. 282, 288 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. . . .

. . . .

. . . *it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment.* Thus, the Government concedes that *the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.* Cf. *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution.

(Footnotes omitted. Italics ours.) The majority opinion concludes that, "Events of the trial may demonstrate *actual prejudice*, but at the present time appellees' due process claims are speculative and premature." (Italics ours.) In a footnote, the court observed that most courts of appeal which have considered pre-indictment delay as a ground for dismissal have treated the question as one of due process and required a showing of actual prejudice.

[1] Although the *Marion* case has been cited for the proposition that due process will require dismissal only when a pre-indictment delay is both actually prejudicial *and* intentionally caused by the prosecutor (*United States v. Beitscher*, 467 F.2d 269 (10th Cir. 1972); *United States v. Daley*, 454 F.2d 505 (1st Cir. 1972)), the more prevalent view would dismiss a criminal prosecution when actual prejudice is shown, and the prosecutor had no reasonable

justification for the delay. *See United States v. Hauff*, 461 F.2d 1061 (7th Cir. 1972); *United States v. Iannelli*, 461 F.2d 483 (2d Cir. 1972); *United States v. Mones*, 336 F. Supp. 1322 (S.D. Fla. 1972).

While intentional pre-indictment delay which actually prejudices a defendant would be grounds for dismissal of a charge (*see Stuart v. Craven*, 456 F.2d 913 (9th Cir. 1972); *Hanrahan v. United States*, 348 F.2d 363 (D.C. Cir. 1965)), there may be circumstances *short* of purposeful delay which, if actually prejudicial to a defendant, would require dismissal.

The factors relevant to a determination of the defendant's contention, which is based upon the due process clause, are similar to the factors delineated in *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972), concerning the guarantee of a speedy trial. The court identified four factors which must be considered in determining whether the right to a speedy trial had been denied. These factors are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. *See also State v. Rock*, 8 Wn. App. 116, 504 P.2d 331 (1972).

Distinctions must be made between the speedy trial analysis applicable to post-accusation delays and the due process analysis relevant to pre-accusation delays. First, citizens cannot be expected to periodically search their consciences and demand that the state grant them exculpation. "There is no constitutional right to be arrested." *Hoffa v. United States*, 385 U.S. 293, 310, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966).

Second, the sort of prejudice likely to result from pre-accusation delays differs from that caused by post-accusation delays. The *Barker* case identifies three ramifications of post-accusation delay which may prejudice a defendant: (1) pretrial incarceration, (2) anxiety and concern of the accused and (3) impairment of the defense. Only the impairment of the defense seems relevant to this case. Impairment of an ability to offer a defense is the impairment of a

vital interest. *Barker v. Wingo, supra; Tacoma v. Heater*, 67 Wn.2d 733, 409 P.2d 867 (1966).

With these considerations in mind, we turn to a discussion and weighing of the factors determinative of the defendant's contention.

The length of the delay between the crimes and initiation of formal accusation was over 5 years. In *Dickey v. Florida*, 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 (1970), Justice Brennan in a concurring opinion suggested that once delay reached a certain point substantial prejudice should be presumed. However, he did not specify at what point such a presumption would arise. The delay in this case is long enough to cause concern about the dimming of memories and lost evidence.

The sole reason for the delay was an apparent difference of opinion between the prosecuting attorney in office at the time of the crime and his successor, who took office in January 1971, as to whether there was sufficient evidence on which to prosecute. No other reason was offered at trial or on appeal. In pretrial proceedings, the prosecutor said: "[T]here has been a five year delay. I don't know why." During oral argument on appeal, the following colloquy occurred:

> THE COURT: What was there available to a prosecutor in 1971 that was not available to a prosecutor in 1965?
>
> PROSECUTOR: I would have to say that either the evidence was the same or that the people who reviewed the case in 1966 weren't as thorough as the people who reviewed the case in 1971.

[2] Three reasons are considered by courts as sufficient justification for delay:

1. The case may be of such a complex nature that considerable time was necessary to prepare the case for prosecution. *United States v. Marion, supra.*

2. It would hinder effective law enforcement operations to charge the defendant immediately after the commission of the crime. This justification sometimes is tendered in cases involving organized crime. *United States v. Russo.*

442 F.2d 498 (2d Cir. 1971); *DuFrane v. Sheriff, Washoe County*, 88 Nev. 52, 495 P.2d 611 (1972).

3. There was insufficient evidence available to prosecute the defendant up until the time he was actually charged. *Harlow v. United States*, 301 F.2d 361 (5th Cir. 1962); *Foley v. United States*, 290 F.2d 562 (8th Cir. 1961).

The absence of the usual reasons for delay is not, of itself, fatal to the state's right to proceed. The justification for the delay must be balanced against prejudice to the defendant's ability to offer such evidence as there is in his defense.

The defendant alleges he was prejudiced by the delay in the following instances:

1. The ability to defend on the ground of mental irresponsibility was diminished since a psychiatrist's current examination could not reveal clearly the defendant's mental condition in 1966.

2. Certain potential defense witnesses had become unavailable. The family doctor had died, and the family priest could not be located. The defense asserts that these witnesses "may have been able" to indicate that Mr. and Mrs. Haga were compatible and past marital problems had been cured. We note that no offer of proof as to their testimony was possible, and there is no reflection concerning the admissibility of such testimony in any event.

3. A major portion of the tape recording of the defendant's statement made in 1966 was lost by the police. We observe that the defendant objected to admission of the remaining portion of the tape at all times during the trial.

4. A letter from the man with whom Mrs. Haga had lived prior to the reconciliation sent to Mrs. Haga's mother was unavailable. Mrs. Haga's mother testified in a pretrial hearing that she received the letter after the deaths and sent it to the police. No mention of the letter was allowed at trial, and its contents are not mentioned in the record other than that the decedent wife's mother felt it important.

5. Several witnesses showed poor memories:

a. An ex-police officer who had investigated the crime had since lost his memory due to an accident. He was called as a prosecution witness but had no memory of the events. His report was excluded on the defendant's motion.

b. Dr. Dona was the first doctor on the scene. He was unable at the trial to recall his actions or remember the extent of rigor mortis when he first saw the body. This evidence would be important to show the time of death. He was unable to recall whether he checked the victim's fingernails, an important item since the prosecution claimed that the defendant had been scratched by the victim in resisting the attack.

c. A neighbor could not remember whether Mrs. Haga mentioned a prowler the night of her murder. In 1966, he said she did. Evidence of his prior statement was admitted for impeachment purposes.

d. Another neighbor could not recall where he heard a loud car stop at 12:40 a.m. the night of the murder. In 1966 in a statement, he said that it had stopped at the Haga house.

e. An insurance agent was unsure whether Mrs. Haga or Mr. Haga asked about insuring the entire family. The prosecution argued that part of defendant's motive could have been insurance money.

f. The defendant was unable to remember many details concerning the day of the crime.

These cumulative contentions have caused us to carefully evaluate the position of the defendant at the time of trial.

The defense counsel presented a vigorous defense. The mother and aunt of the deceased wife were called and testified that they had seen the Hagas the day before the murders and that they seemed happy together. The mother, grandmother and stepfather of the defendant also testified that they had seen the couple shortly before the crime and that they seemed to be happy. The grandmother and mother of the defendant both testified that the defendant had not been feeling well the day before the crimes.

The first doctor to arrive at the scene of the crime had

difficulty recalling the circumstances of his investigation. His statement, taken the night of the murders, was admitted into evidence and was arguably helpful to the defense in that it included observations tending to place the time of death up to 2 hours later than the time estimated by the state's witnesses. Two neighbors testified concerning a car that they heard in the area during the early morning of July 6; a neighbor testified that the deceased wife had complained of prowlers prior to July 1966; and a young man testified to an encounter with a prowler while babysitting for a neighbor of the Hagas. Finally, the defendant testified at length during the trial and denied any participation in the murders.

[3, 4] We conclude that upon an evaluation of the entire proceedings the showing is short of actual prejudice. Only where actual prejudice is shown is reversal justified. *United States v. Marion*, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); *United States v. Iannelli*, 461 F.2d 483 (2d Cir. 1972); *United States v. Capaldo*, 402 F.2d 821 (2d Cir. 1968). Prejudice, whenever it is alleged, must be specially demonstrated and cannot be based upon speculation. *United States v. Marion, supra; State v. Christensen*, 75 Wn.2d 678, 453 P.2d 644 (1969); *State v. Rolax*, 3 Wn. App. 653, 479 P.2d 158 (1970). The allegations of prejudice in this case do not overcome the absence of any statute of limitations concerning the crime of murder in the first degree. We hold that the showing of actual prejudice must be sufficient to overcome the legislative intent expressed by the absence of a limitation on prosecution for such a crime, before the prosecution should be forbidden. The showing of actual prejudice is insufficient to amount to a denial of due process when subjected to that criterion.

OPINION EVIDENCE INFERRING GUILT

The ambulance driver who responded to a call to the Haga residence on the morning of the murders was called by the state. He testified as to the general scene and stated that he observed the demeanor of the defendant. Over the

repeated objections of the defendant, the following testimony was admitted:

> Q Did he show any signs of grief? A No. Q Did you find that unusual? MR. RICHEY: Object. THE COURT: Lay some foundation. Q How long did you indicate that you had been with the mortuary? A I have had my own place for fifteen years. Q During that time have you had occasion to go to scenes where people had died? A Yes. I was a deputy coroner for approximately twelve years. I also operated the ambulance service where I encountered this several times a month—death. Q Based upon your experience did you find the demeanor of the defendant to be unusual? MR. RICHEY: Objection. THE COURT: Overruled.

In argument out of the presence of the jury, defense counsel renewed his objection stating:

> If the Court please, what the prosecutor is attempting to do is have this witness say that the way this defendant acted is unusual, which is a conclusion in relation to other husbands whose wives he has investigated in the past. That is a conclusion on the part of this witness. He has already testified that the defendant showed no grief. That should suffice. That should be sufficient. And then to go ahead and compare it to other persons and other situations goes beyond his realm as a witness in this matter. That goes to what the jury should do. If the jury wants to decide the fact that he showed no grief, and it was unusual that is the jury's prerogative; but it is not the prerogative of this witness.

After the argument, the jury was readmitted and the following testimony admitted:

> Q What was your reason for that? MR. RICHEY: Object, your Honor. He has already indicated that it was unusual and that should be sufficient. THE COURT: Overruled. A For someone whose wife had just been strangled usually the husband or the wife will attempt to assist, if it is a heart attack or something. He was very calm and cool about it. And he didn't attempt to assist us. Usually a husband or wife usually is in the way when you are trying to revive them. And he offered no assistance in helping me whatsoever.

[5] As a general rule, witnesses are to state facts and not to express inferences or opinions. *State v. Dukich*, 131 Wash. 50, 228 P. 1019 (1924); *State v. Wigley*, 5 Wn. App. 465, 488 P.2d 766 (1971). The difficulty in limiting testimony to "facts" and excluding all "opinion" was noted in *Wigley* where the court quoted 32 C.J.S. *Evidence* § 459 (1964) as follows:

> The modern tendency is to regard it as more important to get to the truth of the matter than to quibble over distinctions which are in many cases impracticable, and a witness is permitted to state a fact known to or observed by him, even though his statement involves a certain element of inference.

State v. Wigley, supra at 467. *See also* Model Code of Evidence rule 401 (1942).

However, within the context of this view, certain testimony remains inadmissible as an expression of an opinion. In *Harrelson v. State*, 217 Miss. 887, 891, 65 So. 2d 237 (1953), the conviction of a defendant accused of the murder of his wife was reversed because the testimony of police officers indicating the defendant did not exhibit the expected signs of grief the day of the murder was deemed prejudicial error. The basis of the court's holding was as follows:

> The evidences of lack of grief are not stated. The opinion of the officers, we assume, was based on the fact that the appellant was not visibly manifesting what the witnesses considered signs of grief. The reactions of a person to sorrow or grief vary with the individual. It is a matter of common knowledge that some people undergo sorrow or bereavement with composure. Opinions as to what constitute evidences of grief also vary with the individual.
>
> The general rule is that opinion evidence is not admissible except that of an expert. The demeanor, acts and conduct of an accused, at the time and subsequent to the crime are admissible. However, this should be limited to a statement of the facts by the witness or witnesses, leaving the jury free to form its own conclusions. The admission of the opinion of the officers who investigated

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the killing that the appellant showed no signs of grief, over the objection of the appellant, was improper and highly prejudicial. The opinion of the sheriff, a prominent official of the county, that the appellant showed no signs of grief conveyed to the jury the impression that the sheriff thought the appellant was guilty, and it was calculated to, and undoubtedly did, influence the jury in reaching its verdict. We are unable to say that the appellant in this case received a fair and impartial trial.

A witness may not testify to his opinion as to the guilt of a defendant. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967), said at page 315:

> Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. The question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. § 342 (1965).

The testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

[6] Error which affects or presumptively affects the final results of a trial is deemed prejudicial. We are unable to say whether the defendant would or would not have been convicted but for this error. This testimony, erroneously admitted, could have been a contributing factor in the verdict of the jury. It cannot be deemed harmless. *State v. Mack*, 80 Wn.2d 19, 22, 490 P.2d 1303 (1971); *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968). The conviction must be reversed, and the cause remanded for a new trial.

We turn to other issues raised on this appeal which might arise upon a second trial in order to put them at rest.

In July of 1971, a deputy prosecuting attorney traveled to Oregon to interview the man with whom Mrs. Haga had lived in 1966 while separated from the defendant. The prosecuting attorney learned of this man's history of medical and mental disorders, including tendencies to violence and amnesia, and told him that he need not volunteer this information to defense counsel but that, if asked, he should tell the truth. The state concedes this conduct was improper but argues that the error was harmless.

[7] The state has an affirmative duty to disclose material evidence which may negate guilt or mitigate the degree of the offense where there is reason to believe the evidence is unknown to the defendant. *State v. Finnegan*, 6 Wn. App. 612, 495 P.2d 674 (1972). *See generally Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); ABA standards relating to *The Prosecution Function and the Defense Function* § 3.11 (1971).

The basis for the rule is the due process clause of the Fourteenth Amendment and supression of such evidence, irrespective of the good faith of the prosecution, violates that constitutional provision. *Brady v. Maryland, supra; State v. Temple*, 5 Wn. App. 1, 485 P.2d 93 (1971). Prosecuting attorneys are quasi-judicial officers with an affirmative duty to help assure that an accused is afforded a fair trial. *State v. Gibson*, 75 Wn.2d 174, 449 P.2d 692 (1969); *State v. Huson*, 73 Wn.2d 660, 440 P.2d 192 (1968). However, not every failure to disclose evidence warrants reversal of a conviction. It is only where the failure to disclose has caused prejudice to the defendant and may have had an effect upon the outcome of the trial that a new trial should be granted. *Rhinehart v. Rhay*, 440 F.2d 713 (9th Cir. 1971); *United States v. Bonanno*, 430 F.2d 1060 (2d Cir. 1970).

The defendant states that there is no way of knowing what evidence the prosecution requested Harman to refrain from volunteering and that we should assume the evidence

would have been helpful to the defendant. The deputy prosecutor who interviewed Harman has filed an affidavit stating that he told the witness only that he need not volunteer information concerning his medical history, but that if he did he should tell the truth. The witness, however, did disclose his medical history to the defense prior to trial and allowed defense counsel to examine his medical records. The witness was cross-examined concerning his medical problems and his medical records were offered (but refused) as evidence. Under these circumstances, the misconduct did not prejudice the defendant. The error was harmless.

[8] During the trial, photographs of the deceased wife and child were admitted. The admiss on of photographs is in the discretion of the trial court and will not be disturbed unless there was an abuse thereof. *State v. Adams*, 76 Wn.2d 650, 458 P.2d 558 (1969); *State v. Newman*, 4 Wn. App. 588, 484 P.2d 473 (1971). Photographs are not inadmissible merely because they are gruesome or inflammatory. *State v. Griffith*, 52 Wn.2d 721, 328 P.2d 897 (1958). The test for admissibility of such photographs is whether their probative value outweighs their probable prejudicial effect. *State v. Adams, supra*. There was no abuse of discretion. Proof of a fact should not be impeded because the process is disturbing. The photographs were properly admitted.

Error is assigned to the refusal to admit statements made by the defendant in 1966. During the CrR 101.20W hearing, the defendant's written statement was considered to determine its admissibility at trial. It was not offered during the trial. The statement was signed by the defendant the day after the homicide and contained a denial of any involvement in the crimes. The state did introduce certain statements made by the defendant to a detective during the same time period in which the other statement was prepared.

[9] Evidence of out-of-court statements offered for the

proof of the matters asserted therein is hearsay. *See generally* 5 R. Meisenholder, Wash. Prac. ch. 20 (1965). *State v. Huff*, 3 Wn. App. 632, 636, 477 P.2d 22 (1970), said the following:

> Out-of-court admissions by a party, although hearsay, may be admissible against the party if they are relevant. 5 R. Meisenholder, Wash. Prac. § 421 *et seq.* (1965); C. McCormick, Evidence § 239 (1954). However, if an out-of-court admission by a party is self-serving, and in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule. *State v. King*, 71 Wn.2d 573, 577, 429 P.2d 914 (1967); *State v. Johnson*, 60 Wn.2d 21, 31, 371 P.2d 611 (1962); 5 R. Meisenholder, Wash Prac. § 381 at 380 (1965).

The statement was properly excluded.

The judgment is reversed and remanded for a new trial.

HOROWITZ, C. J., and WILLIAMS, J., concur.

Petition for rehearing denied April 19, 1973.

Review denied by Supreme Court June 20, 1973.